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State v. Nicolai Respondent's Brief Dckt. 41566

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 41566
Plaintiff-Respondent,)	
)	Ada Co. Case No.
v.)	CR-2004-1698
)	
FRANK LESLIE NICOLAI,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

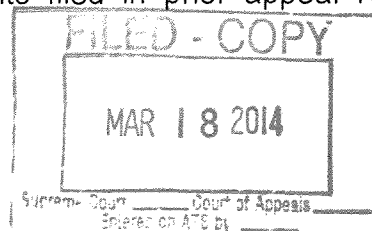
Issue

Has Nicolai failed to establish error in the district court's denial of his I.C.R. 35 motion for correction of his sentence?

Nicolai Has Failed To Establish Error In The District Court's Denial Of His I.C.R. 35 Motion

A grand jury indicted Nicolai for kidnapping and rape. (#35770 R.¹, pp.14-15.)

¹ The Idaho Supreme Court has entered an Order Taking Judicial Notice of the "Reporter's Transcript and Clerk's Record" filed "in related appeal No. 35770, *State v. Nicolai*." (R., p.2.) Consequently, the Court ordered that the record prepared for this appeal be limited and "shall not duplicate any documents filed in prior appeal No. 35770.) (Id.)



Nicolai pled guilty to both counts, and the district court imposed a sentence of 25 years fixed for the kidnapping and a concurrent fixed life sentence for the rape. (#35770 R., pp.72-74.) Nicolai filed a timely Rule 35 motion for a reduction of sentence, which the district court denied. (#35770 R., 77-78, 89-93.) Nicolai filed a petition for post-conviction relief claiming “he had received ineffective assistance of counsel where he was not informed of his right to refuse to participate in the psychosexual evaluation,” and the Court granted him a new sentencing hearing. (#35770 R., pp.95, 101.) Nicolai also filed a motion to withdraw his guilty plea, which the district court denied. (#35770 R., pp.97-106.) The district court held a re-sentencing hearing and again imposed a sentence of 25 years fixed for the kidnapping and a concurrent fixed life sentence for the rape. (#35770 R., pp.118-20.) Nicolai appealed, claiming his sentences are “unduly harsh.” State v. Nicolai, Docket No. 35770, 2009 Unpublished Opinion No. 449 (Idaho App. May 5, 2009). The Idaho Court of Appeals affirmed in an opinion issued on May 5, 2009. Id.

More than four years later, on October 15, 2013, Nicolai filed another Rule 35 motion. In his 2013 motion, Nicolai asserted his life sentence is illegal because, he claimed, “In the State of Idaho, when a defendant is sentenced to a term of ‘LIFE’ he is eligible for parole after serving 10 years of his sentence.” (R., p.14 (capitalization original).) Thus, Nicolai reasoned, his “sentence of ‘FIXED LIFE’ is more than what is prescribed by statute for the offense as charged” because, he believes, there is a distinction between a maximum sentence of life and fixed life. (R., p.15 (capitalization original).) Nicolai further argued this perceived distinction required a jury to find “fixed life” was appropriate under Apprendi v. New Jersey, 530 U.S. 466 (2000). (R., p.15.)

Alternatively (or perhaps additionally), Nicolai argued the court failed to “make the additional findings of fact that are required to elevate the sentence from what is statutorily prescribed, (‘LIFE’), to the sentence that [he] received, (‘FIXED LIFE’).” (R., p.16 (capitalization and punctuation original).) The district court denied Nicolai’s motion. (R., pp.19-22.) Nicolai filed a timely notice of appeal. (R., pp.23-27.)

On appeal, Nicolai asserts the same arguments he raised in his Rule 35 motion. (Compare R., pp.13-17 with Opening Brief of Appellant (“Appellant’s Brief”).) Nicolai then adds to those arguments his take on the Unified Sentencing Act and his belief that under the Unified Sentencing Act, whenever a statute provides for a mandatory minimum, the court may fix only that period of time and no more. (Appellant’s Brief, pp.6-10.) Thus, Nicolai reasons, because both the rape and second-degree kidnapping statutes provides for a one-year minimum sentence, I.C. §§ 18-6104, 18-4504, that is the only period of time the court was authorized to “fix” as a matter of law. (Id.) As to this latter argument, it is not preserved because it was not the basis of Nicolai’s Rule 35 motion. State v. Howard, 150 Idaho 471, 476, 248 P.3d 722, 727 (2011) (“It is well settled that an issue not raised before the trial court cannot be raised for the first time on appeal.”). Nicolai has also cited no relevant authority to support his assertion, which is another reason this Court should decline to consider his claim. State v. Higley, 151 Idaho 76, 80 n.1, 253 P.3d 750, 754 n.1 (Ct. App. 2010).

Even if considered, however, Nicolai’s claim fails because trial courts have discretion to “impose sentences within the maximum limits set by statute.” Cook v. State, 145 Idaho 482, 488, 180 P.3d 521, 527 (Ct. App. 2008). Where “the offense carries a mandatory minimum penalty as provided by statute, the court shall specify a

minimum period of confinement consistent with the statute.” I.C. § 19-2513. The minimum period of confinement for both rape and second-degree kidnapping is “imprisonment in the state prison **not less than** one (1)” year. I.C. § 18-6104 (rape), 18-§ 18-4504 (second-degree kidnapping) (emphasis added). Contrary to Nicolai’s argument, the plain language of neither statute supports his claim that the mandatory minimum, *i.e.*, fixed term, can only be one year; rather, the minimum term is “**not less than** one (1)” year and, in the case of rape, the fixed term “may be extended to life,” I.C. § 18-6104, and, for second-degree kidnapping it can extend up to 25 years, I.C. § 18-4504. (Emphasis added.) Even if considered, Nicolai’s unpreserved claim that his sentences are illegal based on the district court’s imposition of more than a one-year fixed term on each count is without merit.

Nicolai’s preserved arguments regarding the legality of his sentences are also without merit. First, Nicolai cites no authority for his assertion that “when a defendant is sentenced to a term of ‘LIFE’ he is eligible for parole after serving 10 years of his sentence” (Appellant’s Brief, p.2) because no such authority exists.

Second, as noted, I.C. § 18-6104 provides that the punishment for rape “may be extended to life in the discretion of the District Judge.” The judge in Nicolai’s case exercised his discretion in imposing the maximum sentence allowed by law – fixed life. The court’s decision to fix the entire term was not, as Nicolai claims, “more than what is prescribed by the statute,” much less illegal. (Appellant’s Brief, p.3.)

Third, because the court’s fixed life sentence was within the statutory maximum, Nicolai’s assertion that his sentence violates the principles of Apprendi, fails. See Apprendi, 530 U.S. 466 (2000) (holding that other than the fact of a prior conviction, any

fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt).

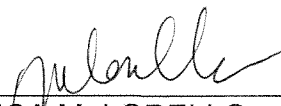
Finally, with respect to Nicolai's complaint that the district court failed to make specific findings to support imposition of a fixed life sentence, the district court correctly noted such an argument is "irrelevant to the question of whether the sentence [is] illegal on the face of the record." (R., p.21.) Because Nicolai's 2013 Rule 35 motion was based on a claim of illegality, and could only be based on a claim of illegality given that it was filed more than 120 days after the entry of judgment, I.C.R. 35(b), and because Nicolai's complaint about the lack of findings to support his sentence does not make his sentence illegal, this argument need not be considered further. Moreover, as noted by the district court, Nicolai has already litigated whether his sentences are excessive. (R., p.21.) He may not relitigate that issue now. State v. Rhoades, 134 Idaho 862, 863, 11 P.3d 481, 482 (2000) (doctrine of res judicata prevents re-litigation of issues that have been previously decided in a final judgment or decision in an action between the same litigants).

Nicolai has failed to show error in the denial of his 2013 Rule 35 motion.

Conclusion

The state respectfully requests this Court affirm the district court's order denying Nicolai's Rule 35 motion.

DATED this 18th day of March, 2014.

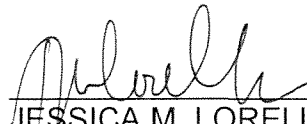


JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of March, 2014, I caused a true and correct copy of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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